SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 150.

H. F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company,
Plaintiffs in Error,

vs.

JOHN SMITHSON,
Defendant in Error.

NOTICE, MOTION AND BRIEF FOR DEFENDANT IN ERROR.

JOHN A. LOVELY,
Attorney for Defendant in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM.

No. 150.

H. F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company,

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vs.

JOHN SMITHSON,

Defendant in Error.

To Messrs. Thos. H. Gill and McDonald & Barnard, and H. F. Whitcomb and Howard Morris, Receivers.

Gentlemen:

You will please take notice, that upon the annexed motion and brief, which will be submitted to the Honorable the Supreme Court of the United States on Monday, the 27th day of November, 1899, the defendant in error, through his counsel, will ask that the said writ of error be dismissed upon the ground stated in the annexed motion, or that if said court shall decline to dismiss said action, that the judgment therein, brought into said United States Court upon said writ of error, be affirmed upon the grounds stated in said motion and for such other relief on said motion as may be just and proper.

John Adamly,

Attorney for Defendant in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM.

No. 150.

H. F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company,
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vs.

JOHN SMITHSON,
Defendant in Error.

Now comes the above named John Smithson, defendant in error, by his counsel, John A. Lovely, and moves this honorable court that the writ of error heretofore directed to the Supreme Court of the state of Minnesota to return the record of its proceedings in said cause to this court, be hence dismissed upon the ground that no federal question is involved therein as appears by the return of such record into this court.

For the further reason that this honorable court has not jurisdiction of said cause, but the District Court of the State of Minnesota, for the county of Ramsey, wherein said cause was tried, and wherein

judgment was duly rendered in favor of said defendant in error, which said judgment was affirmed by the Supreme Court of the state of Minnesota, has final and ultimate jurisdiction of said cause and the whole thereof.

And it is further moved in connection with said motion to dismiss and in addition thereto that the said judgment of the said District Court of Ramsey county, state of Minnesota, which judgment was affirmed by the Supreme Court of Minnesota be affirmed by this court upon the ground that it is manifest the writ of error was taken for delay only, and that the question on which jurisdiction depends is so frivolous as not to need further argument in this court, as will more fully appear at large by the brief hereto attached for the consideration of this court upon such motion in connection with the transcript of record heretofore printed.

John A. Eberly

Attorney for Defendant in Error

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1899.

No. 150.

HENRY F. WHITCOMB and HOWARD MORRIS, as Receivers of the Wisconsin Central Company,

Plaintiffs in Error.

vs.

JOHN SMITHSON,

Defendant in Error.

In error to the Supreme Court of Minnesota.

Brief on motion to dismiss coupled with a motion to affirm.

It is the claim of the moving party—the defendant in error—that no Federal question is involved in this controversy, and that at all events the right of the defendant in error is so clear to the judgment below in his favor, that he is entitled to have the same affirmed under the provisions of rule 6, Sec. 5, as applied in

Arrowsmith v. Harmoning, 118 U. S. 194.

Church v. Kelsey, 121 U. S. 282 and subsequent cases.

Chanute City v. Trader, 132 U. S. 210.

Richardson v. R. R. Co., 169 U. S. 128.

The matters of contention here have all been fully considered by the Supreme Court of Minnesota, and the issues involved, are so aptly and accurately stated in the opinion of that court and present so clearly the only questions that can be controverted in this tribunal, that we cannot do better than to adopt the same in presenting the reasons which support our motion, *premising* that the italics are our own.

This was an "action for personal injuries received by plaintiff while he was serving defendant Chicago Great Western Railway Company as a locomotive fireman, and in a collision between the locomotive on which plaintiff was at work and another operated by defendants, Whitcomb and Morris, as receivers, under appointment by the United States Circuit Court, of the Wisconsin Central Railway Company. It was alleged in the complaint that both of these defendants operated locomotives and trains over about four miles of track owned by the Chicago & Northern Pacific Railway Company, in the City of Chicago, and it was on this piece of track that the collision occurred. The negligence alleged on the part of the receivers was in allowing their locomotive to stop and remain standing in the night-time at a certain place on their tracks, and when there was imminent danger of a collision, without giving proper or any signals of having so stopped; while the negligence on the part of the Chicago Great Western Company was alleged to be an omission and failure on its part to adopt or establish proper or any rules for the giving of warn-

ing signals by its own or other locomotives or trains while being operated on said track."

"1. The first question in the case grows out of certain steps taken by the receivers in an effort to remove the cause to the Federal courts. To this end, and in due time, the receivers filed a petition for removal and a bond in the District Court for Ramsey county, in which court the action has been instituted. The other defendant did not join in this petition, but duly answered in the action. An order of the District Court removing the cause as petitioned was made, and a few days afterwards, upon the hearing of an order to show cause, *the case was remanded by the Federal court to the Ramsey county District Court upon the ground that it had been improperly removed from the latter,* the formal order remanding being filed in February, 1896. *The receivers were then in default for want of answer, and on the 4th day of June stipulated in writing with plaintiff's attorneys, in consideration of being relieved from this default, and in consideration of their being allowed to answer in the action, that the issues so made should be tried in said District Court at the June term, 1896, and that in case of a final judgment against them they would not oppose the allowance of such judgment by the master in chancery.* An answer was served in accordance with this stipulation, to which plaintiff replied, and thereafter the cause was continued by consent of counsel for plaintiff and for the receivers until the April term, 1897. It then came on for trial as against both defendants, but counsel

for receivers, *in disregard of the remanding order of the Federal Court and their own stipulation,* attempted to interpose an amended answer, alleging, among other things, a want of jurisdiction on the part of the District Court, on the ground that the cause had theretofore been duly removed to and was then pending in the Circuit Court for the United States, and not elsewhere; and also objected to the introduction of any evidence, upon the ground that the case was still pending in the United States Circuit Court. The District Court very properly refused to permit the amendment, and plaintiff submitted his proofs to a jury. Defendants offered no testimony. The court then directed the jury to return a verdict in favor of the Chicago Great Western Company upon the ground that plaintiff had failed to make out a case against it; whereupon counsel for receivers filed another removal petition and bond, demanding that, as the Chicago Great Western Company was no longer a defendant, the case was then one for removal. The court below refused to consider the petition, charged the jury, and, in due season, separate verdicts were returned—one in favor of plaintiff, and against the receivers, for substantial damages; the other, of no cause of action as to the railway company." Transcript of Record, pages 124-125 and 126.

By reference to the petition for writ of error it will appear that the facts stated by the Supreme Court of Minnesota are conceded and adopted by the learned counsel for plaintiffs in error. These

facts are pertinently stated in such petition in the fourth and fifth paragraphs as follows:

"Fourth. That said bond on removal was approved by the State court and a transcript of the record in said action therein duly sent to and docketed in the Circuit Court of the United States for the District of Minnnesota, and that said plaintiff, Smithson, appeared in the said United States Circuit Court, and, answering said petition for removal, denying collusion and fraud to prevent removal, moved to remand said action to said State Court, and, after a hearing upon said motion, the said Cirsuit Court of the United States for the district of Minnesota, by Nelson, district judge, on the 6th day of February, 1896, granted the motion to remand 'on authority of Thompson v. C., St. P. & K. C. R'y Co. and C., M. & St. P. R'y. Co., (60 Fed. 773).' The case thus referred to was remanded for the reason that there was no separable controversy."

"Fifth. That thereafter and on the 4th day of June, A. D. 1896, the defendants, receivers, being in default in said State court for want of an answer, stipulated in writing with the attorneys for the plaintiff Smithson that in consideration of waiving said default and permitting the said defendants, receivers, to answer therein, the said cause should be tried at the June term of said State court, 1896, 'and in case of final judgment in said action in favor of said plaintiff and against said receivers, that the said receivers would not oppose the

allowance thereof before the master in chancery' in the original equity case in which the said receivers had been appointed."

Transcript of Record, page 4.

In this connection it may be material to consider the full text of the stipulation above referred to, which is as follows. *Totidem verbis*:

STATE OF MINNESOTA, DISTRICT COURT.
County of Ramsey.

JOHN SMITHSON,

Plaintiff.

vs.

THE CHICAGO GREAT WESTERN RAILWAY COMPANY and H. F. WHITCOMB and HOWARD MORRIS, Receivers of the Wisconsin Central Company,

Defendants.

Whereas, defendants, H. F. Whitcomb and Howard Morris, Receivers above named, have not answered herein, and are in default of an answer. Now, in consideration that plaintiff allow said defendants, H. F. Whitcomb and Howard Morris, receivers, to serve an answer herein, said defendants, H. F. Whitcomb and Howard Morris, receivers, hereby stipulate and agree that the plaintiff *shall have a trial* of this case in said court at the June term thereof, 1896, so far as defendants H. F. Whit-

comb and Howard Morris are concerned, and in case of a final judgment in said action in favor of said plaintiff against said receivers that the receivers will not oppose the allowance of the same before the master in chancery.

June 4th, 1896.

J. A. LOVELY,
J. F. GEORGE,
Attorneys for Plaintiff,
THOS. H. GILL and
McDONALD & BARNARD,
Attorneys for Defendants H. F. Whitcomb and Howard Morris, Receivers.

Filed April 20th, 1897.

See pages 25 and 26, Transcript of Record.

After this stipulation was made, the receivers answered and plaintiff replied, thus joining issue in the State Court.

Transcript of Record, pages 26 and 27.

The case was then duly noticed by plaintiff's attorneys and was afterwards again continued by stipulation.

Transcript of Record, page 28.

It appears then, that the essential facts here stated relative to the jurisdictional question involved which is now the only matter before this court are:

1st. That the joint action against the receivers of the Wisconsin Central Company and the Chicago Great Western Company was duly remanded

upon the motion of the plaintiff below to the State Court where it had been commenced.

2nd. That after the order remanding the same had been filed in the State Court, the plaintiff in error agreed for a consideration to waive any question of jurisdiction and try the case in the State Court.

I.

The right to remand is res judicata and has been decided adversely to plaintiff in error.

The effect of the order of the Federal judge, remanding the cause to the State Court, ought not to be open to doubt or conjecture, providing that court had the legal power to make such an order, and that it had such power is not now an open question. It is no longer a matter of contention either, that such power when so exercised is final and not open to further discussion or contest in the further proceedings of this particular cause.

It is provided by the Act of Congress under which the removal was sought, and the subsequent remand enforced that:

"Whenever any cause shall be removed from any State Court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal nor writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."

Supt. to Revised Statutes of United States 1874-1891, pages 611-614, 25 Stats. 433.

It will be seen that this provision of the law is comprehensive, makes no distinction whatever as to the character of the defendants, whether the same be individuals or corporations, but embraces all cases wherein a controversy may arise between the State and the Federal judiciary, upon the right to hear and determine the cause and substantially declares that the judgment or order of the Federal Court remanding the cause shall be final in every case.

The authoritative evolution of the law by the Federal Court of last resort recognizes the full force of the Statute referred to and the conclusions we have drawn as to its undoubted meaning and application.

Morey v. Lochart, 123 U. S. 56, 58.

Wilkenson v. Nebraska et al., 123 U. S. 286-7-8.

Sherman v. Grinnell, 123 U. S. 679-80.

Railway Companies v. Thouron, 134 U. S. 45 to 67.

Gurnee v. Patrick County, 137 U. S. 143-4-5.

In re. Penn. Co. Petr., 137 U. S. 451 to 58.

Missouri Pacific v. Fitzgerald, 160 U. S. 556 to 581.

A review of these decisions leads to the unanswerable conclusion that the decision of the subordinate Federal Court remanding a cause is absolute; in each of the above cases will be found emphatic assertions of this conclusion so clear and decisive, that it would seem that "a way-faring man could not err therein."

And the reason for this rule of final determination is stated in the last authority cited to be "to contract the jurisdiction of the Federal Courts."

Missouri Pacific v. Fitzgerald, *Supra.*

Counsel claimed that in the last case there are some qualifications in favor of receiverships, we can find none, the conclusions in their application are unlimited, and as to the present status of the question of jurisdiction, are summed up in the following language:

"If the Circuit Court and the State Court go to judgment respectively, each judgment is open to revision in the appropriate mode."

The Removal cases, 100 U. S. 457.

"But if the Circuit Court remands a cause and the State Court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment. A State Court cannot be held to have decided against a Federal right when it is the Circuit Court, and not the State Court, which has denied its possession. The Supreme Court of Nebraska rightly recognized the courts of the U. S. to be exclusive judges of their own jurisdiction, and declined to review the order of the Circuit Court."

Missouri Pacific v. Fitzgerald, *Supra* 582.

We commend particularly for the reasons of the action of congress, the last three poragraphs of the last cited case.

Our own Supreme Court has held that where the Federal trial Court decided on the question to remand, it will act in accordance with such determination. In a well considered case where this question was involved it held that the State Court

in which the action was brought "had jurisdiction of the subject matter and of the parties. Its right and power, as well as its duty to proceed to a trial, after the trial court had refused to entertain the case and had remanded it, ought not to be challenged. The ruling of the latter when remanding cannot be reviewed in the State Courts."

Tilley v. Cobb, 56 Minn. 295-299.

See Roberts v. Railway, 48 Minn. 521.

The inevitable result of any other rule would be to deprive the plaintiff of any redress whatever. For since the Federal Court has denied jurisdiction the State Court ought not and will not allow the substantial rights of plaintiff to be foundered in any such sea of doubt and difficulty, but will enforce the remedy of which the plaintiff would otherwise be deprived.

The effort of the plaintiff in error to deprive the State Court of jurisdiction at the close of the case on its trial should not meet with any favorable consideration at the hands of this court.

The situation so far as the question of jurisdiction is concerned was not changed by the order of the court at the end of the trial directing the verdict in favor of one of the parties—the Chicago Great Western Company. The whole testimony had been introduced to support every issue. The Great Western Company had rested, the plaintiff in error had rested also, when the Great Western Company asked for an instruction to the jury that they find for the defendant which was granted. Upon this

direction of the court without any judgment or final order being entered, a petition and bond was filed for removal as the result of the contention of the parties in the ordeal of legal controversy.

Transcript of Record, pages 107-108.

The only cases which counsel has been or will be able to urge against the views contended for above are those where, before the actual trial commenced, there was by the *voluntary* action of the plaintiff in the state court, such a change of parties as to eliminate or reform the jurisdictional conditions entirely.

Such is the recent case of Powers v. The Chesapeake & Ohio, 169 U. S. 92.

From first to last defendant in error had contended that the Great Western Company was liable. By the direction of the State Court a verdict was ordered against him on that proposition.

It will not be presumed to be the fault of the defendant in error, so far as jurisdiction is concerned, that the court, over his objection, ordered a verdict against one of the defendants in the action.

In Arrowsmith v. Nashville Railroad Co., 57 Fed. 169, it is said:

"That ultimately it may turn out that one is not liable at all and the other exclusively so, *is a question on the merits and does not effect the jurisdiction.*"

While the petition for removal alleged that the suit was collusively commenced against both parties, this charge was denied by the answer of de-

fendant in error and in whose favor such issue was determined by the Federal judge whose decision is conclusive upon that matter.

Black's Dillion on Removal, p. 232, Sec. 137.

Louisville, etc. Ry. Co. v. Wangelin, 132 U. S. 599.

It has been held that where proceedings in the trial of a cause had eliminated certain defendants, leaving parties in the case that would have made the action originally removable, that it was then too late to attempt such a removal, and this before a trial in the State Court had commenced, *"for a party may not experiment on his case in the State Court,"* and upon an adverse decision then transfer it to the Federal Court.

Rosenthal v. Coats, 148 U. S. 142-145.

Jifkins v. Sweetzer, 102 U. S. 177.

When the State Court was invested with jurisdiction of the case, the order of the Federal Court was not only decisive, but plenary, it transferred jurisdiction of all parties to the controversy to do between them what that court in the exercise of its judgment under due process of law should deem best. Having thus acquired jurisdiction, and having entered upon the trial of the case, it is not clear to us how any ruling which it might make *pendente lite* in the exercise of its jurisdiction, could deprive it of its rights to proceed further, or prevent such court from hearing the case to its ultimate determination of the rights of each or all the parties. The theory of the plaintiff in error that the ruling of

the trial court upon the ultimate rights of one of the parties deprived it of the further right to proceed against the other, could only be supported by reading into the act of congress the proviso that the State Court should have jurisdiction to determine the case if it decided the issue in a certain manner, otherwise not. Such a concession of jurisdiction would be a "barren sceptre" hardly worth acceptance.

II.

The stipulation to try the case in the State Court was conclusive upon all parties.

The District Court of the State of Minnesota, for the County of Ramsey, was a court of general jurisdiction under the constitution of that state, having plenary power to hear and determine all controversies at law and in equity, and saving the right of removal provided for by congress, such court was competent to try that issue.

After the attempt to remove had failed and the Federal Court to whom it was sought to transfer this cause had remanded it under the act of congress (supplement to Revised Statute 1887 to 1891, page 613. 25 Stat. 433) the State Court then had the only power existing to hear and determine the case. But if there could have been any doubt as to the jurisdiction of the State Court, such doubt was dispelled by the agreement which we have quoted.

Were it competent as a matter of practice to review the order of Judge Nelson of the Federal

Court remanding the cause, yet this agreement made by the parties at bar by which the plaintiff in error, who was then in default, obtained leave to answer and to contest the right of plaintiff below to recover, forecloses them from any further controversy upon the question of jurisdiction as fully and effectually as if the receivers had put in an answer without filing any petition or bond of removal.

The disposition of this question by the Supreme Court of Minnesota cannot be answered. It held "the receivers, in consideration of being permitted to answer the complaint after having been in default for several months, expressly agreed to try the case in the State Court. Through this agreement they secured a substantial right—the right to answer. If prior to that time there had been a real controversy over the receivers' right to have the cause tried in the Federal Court, *it was then and there settled by a formal stipulation, deliberately entered into by the counsel*, which they must abide by, and which will be enforced by the courts, in the interest of fair dealing and professional good morals. It seems hardly necessary to conclude on this feature of the case by saying that a defendant who is entitled to have his case removed from a State to a Federal Court, or from the latter to the former, there being no question of jurisdiction over the subject-matter or over the parties, may waive his rights to insist upon a removal by his acts or omissions."

Transcript of Record, page 126.

"A party to a suit in a state court may, so far as concerns that particular litigation, waive his right to remove the same to the Federal Court. Such waiver touches no question of public policy; its effectiveness stands upon the maxim that any man may renounce a legal right which is conferred *only for his own advantage.* And he may make such waiver, after the suit is brought, not only by a stipulation or agreement, but by conduct which is equivalent to a waiver."

Black's Dillion on Removal, page 20, Sec. 15.

Hanover Nat. Bank v. Smith, 13 Blatchf., 224. Fed. Cas. No. 6035.

Wadleigh v. Standard Ins. Co., 76 Wis. 439; 45 N. W. 109.

Home Ins. Co. v. Curtis, 32 Mich. 402.

Evans v. Smith, 21 Fed. 1.

First Nat. Bank v. Conway, 67 Wis. 210; 30 N. W. 215.

Hudson River Co. v. Day, 54 Fed. 545.

Amy v. Manning, 144 Mass. 153.

Under the practice acts of Minnesota the receivers were required to answer the plaintiff's complaint in twenty days from the service of the same upon them. They permitted several months to pass meantime remaining in default, and could not have been heard by reason of such default either in the State or Federal Courts. When the order to remand was made and the case returned to the State court the plaintiff, under the statutes of Minnesota, could have asked for a reference and proven his case without the intervention of the defendant receivers, but the receivers, who had permitted such default to occur desired to answer and contest their

rights and to obtain that right agreed to waive all questions of jurisdiction if they were permitted to do so, and it was not on the part of such receivers merely a submission to a rule of practice after the order to remand, but a deliberate concession by them of any privilege which they might have or desired to assert, to question the right of the State Court to try the cause, and it would seem as suggested by the Supreme Court of Minnesota to be an act of questionable good faith for them to afterwards insist that the court in which they consented to try the cause did not have jurisdiction to hear and determine it, and under the views and authorities above presented we submit the stipulation forecloses the receivers from questioning the jurisdiction of the court in which the verdict was rendered against them.

It is respectfully submitted for the reasons stated that the State Court had jurisdiction and that its ultimate judgment should not be disturbed.

John A. Lovely,

Attorney for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 150.

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ERROR TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

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ERROR TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

This is an effort to review the order of the Minnesota Supreme Court affirming a judgment entered upon a verdict rendered in the District Court for Ramsey County in favor of *Defendant in Error.*

A motion of recent date (November 27) was entered to have the order and final judgment of the Minnesota Supreme Court affirmed under Rule 6th

Section 5; since such motion was filed it has been stipulated by counsel that the further consideration of the questions involved in the hearing in this court be finally submitted upon printed briefs, and that all oral argument be waived therein.

See stipulation on file.

In accordance with such stipulation, Counsel for *Defendant in Error* herewith submits such concurring and additional views in support of the judgment of the Minnesota Court as appear cogent and necessary on the final presentation of the questions involved.

STATEMENT OF ISSUES IN THIS COURT.

This action was brought in the Ramsey County (Minnesota) Court against the Great Western Company and the Receivers of the Wisconsin Central Company, both non-resident companies, by John Smithson (Defendant in Error) a citizen of Minnesota, who had received very serious injuries while in the employ of the Great Western Company as a locomotive fireman in the Chicago yards while he was at work in the regular course of his duty.

The Receivers sought to remove the whole cause without the concurrence or co-operation of the Great Western Company into the United States Circuit Court for the District of Minnesota, upon several grounds, among others that there was a joinder of the two companies for the purpose of defeating the jurisdiction of the Federal Court, and affidavits were presented by the petitioners in support of this claim, which were denied by De-

General Statutes Minnesota (1894).

Sec. 5194. "The summons must be subscribed by the plaintiff or his attorney, and directed to the defendant, requiring him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service."

Sec. 5354. "Judgment may be had, if the defendant fails to answer the complaint, as follows:

"First. When, in an action arising on contract for the payment of money only, the summons has been personally served, and the plaintiff shall file with the clerk proof of personal service of the summons, and that no answer has been received * * * the clerk shall thereupon enter judgment for the amount mentioned in the summons. * * * In other actions for the recovery of money only, on filing the like proof, the plaintiff may apply to the court for a reference, to have his

fendant in Error, who seasonably moved the Federal Court under the Statutes to remand the cause to the State Court for trial.

After argument and full consideration of the questions raised by the petition of Plaintiff in Error, and the opposing affidavits, the United States Circuit Court ordered the cause remanded to the Ramsey County District Court which remand was *"immediately carried into execution"* under 25 Stats. 433.

After the cause was returned to the State Court under the remanding order, the receivers defaulted, and allowed the time which by the practice acts of Minnesota they were required to appear and plead to expire, without answering Smithson's complaint, upon such default, unless relieved therefrom, there was nothing—so far as Receivers were concerned to do, but have a referee appointed and judgment ordered, or entered by the Court without referee.

General Statutes of Minnesota, 1894.

Sec. 53, Chap. 66, Gen. Statutes 1878.

Sec. 210, Chap. 66, Gen. Statutes 1878.

Sec. 5194, Statutes 1894.

Sec. 5354, Statutes 1894.

After the Receivers had remained in default for several months it seems that they desired to answer and were willing to waive jurisdictional questions, and try the case on their part in the State Court to which it had been remanded, and in conformity with this view they made a stipulation with Defendant in Error, wherein after reciting that

they (the Receivers) "had not answered and are in default of an answer. Now, in consideration that plaintiff (Smithson) allow said defendants (Plaintiffs in Error), Receivers to serve an answer herein said defendants * * * hereby stipulate that the plaintiff (Defendant in Error), *shall have a trial of this cause in said court.* (Ramsey County State Court) at the June Term thereof, 1896, so far as defendants (Receivers) are concerned, and in case of a final judgment in favor of said plaintiff (Defendant in Error) against said Receivers, that the Receivers will not oppose the allowance of the same before the Master in Chancery."

Transcript of Record, pages 25-26.

The plaintiffs in error availed themselves of the privilege thus granted of opening the default, duly answered, but after having answered upon the condition that Smithson so far as they were concerned should "have a trial" in the State Court, has contested and denied that right ever since. In the meanwhile and at all times its co-defendant, the Great Western Company contented with the jurisdiction of the State Court contested its substantial rights therein without remonstrance or objection.

When the case was finally reached for trial, plaintiffs in error offered to file an amended answer, setting forth, in addition to its first answer, (interposed after the stipulation), that "this Court is wholly without jurisdiction to hear, try and determine the matters at issue in this action for the reason that the matter has heretofore been properly removed to, and is now only properly and lawfully

pending in the Circuit Court of the United States for the District of Minnesota."

Transcript of record, pages 26-41.

In passing—as a pertinent part of the statement of the issues—the concession in Plaintiff's brief should be noted, viz.:

"However the remanding order was probably final so far as the first petition was concerned" citing

Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.
Powers v. C. & O. Ry. Co., 169 U. S. 92.
Brief of Plaintiff in Error, page 6.

The motion to amend by inserting the denial of jurisdiction in the State Court was refused (rightly according to concession in brief of opposite counsel) and the two railroad companies proceeded simultaneously to contest the right to recovery by Defendant in Error against each or either, as the record shows with all the arts and ability—usual in cases where a verdict is sought in an action against co-defendants jointly charged with negligence.

At the close of the testimony when the several parties had *closed and rested*, the trial court heard a motion from each of the railroad companies for an instruction to the jury to find in its favor.

Transcript of Record, pages 107-108.

The motion was granted in favor of the Great Western Company but refused as to the Receivers, and upon the charge of the Court as between the Defendant in Error and Receivers, his right to re-

cover was duly submitted, before the final instructions of the court were given the same petition and bond originally offered by which the removal was made were again offered to the Court who declined to consider them but proceeded as above set forth.

Transcript of Record, pages 108-109.

And a verdict was rendered in favor of Defendant in Error and against the Receivers which was affirmed in the Supreme Court of Minnesota.

Transcript of Record, pages 123-129.

While an exception was entered by the Receivers to the order of the Court directing a verdict for the Great Western Company, it does not appear that any judgment has been entered upon such order nor that any review has been asked in the Appellate Court of Minnesota, nor does it appear that any steps were taken in the Federal Court of the District of that state upon the last application for removal, nothing in fact has been done by the Receivers in either case.

Of course it goes mainly upon its bare statement that if the Courts of Minnesota had the right to try the case as against both the defendant parties in the courts of that state, the final judgment of its Supreme Court is valid and should not be interferred with by this court, hence the controversy here seems to involve three considerations, viz.:

1. The effect of the order of the Federal Court remanding the case to the District Court of Ramsey County for trial.

2. The agreement in writing securing relief

from the default of Plaintiffs in Error, that Defendant in Error *should have* a trial in the State Court and

3. The effect of the last effort to remove the cause during the trial.

While it is not contended that, upon the complaint, a cause of action is not stated against both companies, notwithstanding the decision of the Federal Court when it remanded the case that the joinder was not so fraudulent as to defeat Federal jurisdiction, it seems to be inferred or hinted that the Great Western was essentially not a real party for the purpose of forsensic controversy; such inferences are opposed to the facts either upon the pleading of the party who brought the suit or the evidence introduced upon the trial to support the same, a brief examination of the facts in this respect will disclose a real *bona fide* contest on the part of Defendant in Error against both companies as well as an entire absence of any possible defence upon the merits on the part of the receivers.

STATEMENT OF ISSUES IN STATE COURT.

The issues as presented in the complaint of Smithson, as well as the substantial facts to support its allegations have been so clearly stated by Mr. Justice Collins in the opinion of the Supreme Court of Minnesota, that it is best to adopt such statement for the purpose of this review, particularly since the statement of the learned judge who delivered such opinion does not seem to be questioned in any respect.

"Action for personal injuries received by plaintiff while he was serving defendant, Chicago Great Western Railway Company, as a locomotive fireman, and in a collision between the locomotive on which plaintiff was at work and another operated by defendants Whitcomb and Morris, as receivers, under appointment by the United States Circuit Court, of the Wisconsin Central Railway Company. It was alleged in the complaint that both of these defendants operated locomotives and trains over about four miles of track owned by the Chicago & Northern Pacific Railway Company, in the city of Chicago, and it was on this piece of track that the collision occurred. The negligence alleged on the part of the receivers was in allowing their locomotive to stop and remain standing in the night-time at a certain place on their track, and when there was imminent danger of a collision, without giving proper or any signals of having so stopped; while the negligence on the part of the Chicago Great Western Company was alleged to be an omission and failure on its part to adopt or establish proper or any rules for the giving of warning signals by its own or other locomotives or trains while being operated on said track."

Transcript of Record page 125.

"We have stated that the accident occurred upon the track of another company, in the city of Chicago. This company leased the use of its two tracks, one for outgoing, the other for incoming trains, to these defendants, from what was known as the 'Robey Street round house' to the vicinity of Forest Home. Both defendants used this round house, and plaintiff worked upon a freight locomotive which usually left the round house about 8:20 p. m., and, taking the train crew, ran out to the yard, about three miles, where it coupled on to its train and proceeded westerly. A freight locomotive, operated by defendant receivers, usually left the round house 15 or 20 minutes later, and, running over the same track, took up its train at the receiver's freight yard, in the same vicinity. On the night in question the locomotive on which plain-

tiff worked was delayed in starting because of the non-appearance of a brakeman and, at the request of the engineer, who was employed by the receivers, his locomotive was given the right of way. After it had been gone about 20 minutes the locomotive on which plaintiff worked started. When it reached a point near Forty-eighth Street it ran into the other locomotive, and plaintiff received a severe injury. It appears from the evidence that, when the receivers' locomotive reached a point on the main track about opposite the caboose of the train it was to haul out, which was upon a paralleling yard track, it was stopped, and there remained long enough for the other locomotive to run into it. The sole purpose of stopping at this point seems to have been to afford some of the trainmen an opportunity to transfer a large dog from the cab of the locomotive, where it had been riding, to the caboose of the train. There was one red light upon the rear of the tender of the receivers' locomotive, but this was not seen by the men on the other locomotive until it was too late to avert the collision. While stopping, the men operating the locomotive in advance had taken no precautions whatsoever towards protecting themselves from collision. It also appeared from the evidence that the railway company owning these tracks had promulgated and put in force a number of rules for the government of all trainmen while using or occupying these tracks. Several of these rules were applicable to a locomotive or train stopped upon the main track outside of station grounds, and No. 127 was in these words: "Inasmuch as trains may be expected at any time to be entering the yards or sidings, or to stop at any point without reference to schedules, and as switches are constantly in use, engineers or conductors running trains or engines between Chicago and Central Avenue must at all times so control their trains or engines as to be able to stop within the range within which an obstruction of the track and the position of switches can be plainly seen; but nothing in this will be held as an excuse for the failure to display proper signals when trains or engines are held on the main track, and men in

charge of trains or engines when in danger of being overtaken by another train, must protect themselves by flags, lamps, fusees, or torpedoes, promptly, to avoid all possibility of being run into."

Transcript of Record, pages 126-127.

In addition to the facts above stated it appears from the record that the numerous engines of these companies, the two defendants above, as well as those of the terminal company occupied a round-house near the main tracks over which they were all to pass, without being scheduled, or without rules or time positively fixed for their departure respectively, in fact the only rules for the regulation of the departure and movement of engines leaving the Robey Street round house were those provided by the Terminal Company, that the company employing Smithson had no rules or regulations regarding the movement of engines at the place where he was injured. The Terminal Company adopted all the rules controlling the matter.

Transcript of Record, pages 105-107.

And it also appeared in evidence that the injured party had never been furnished or put in possession with the rules of the Terminal Company which it is claimed were adopted by his employer, The Chicago Great Western Company.

Transcript of Record, p. 55.

It is contended in behalf of the defendant in error upon the record:

1. That the remanding order was final.
2. That the Plaintiff in Error is barred by its

own agreement from objecting to the jurisdiction of the State Court.

3. That the petition and bond filed at the close of the testimony did not deprive the State Court of the right to go on with the case.

I.

The Remanding Order Was Final.

The removal of cases from State to Federal Courts has been from time to time a matter of consideration by congress and has finally been completely considered and disposed of in the most comprehensive terms.

> "Whenever any cause shall be removed from any State Court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal nor writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."
>
> Supt. to Revised Statutes of United States 1874-1891, pages 611-614, 25 Stats. 433.

It will be seen that this provision of the law is conclusive, makes no distinction whatever as to the character of the defendants whether the same be individuals or corporations, but embraces all cases wherein a controversy may arise between the State and the Federal judiciary, upon the right to hear and determine the cause and substantially declares that the judgment or order of the Federal Court remanding the cause shall be final in every case.

The authoritive evolution of the law by the Federal Court of last resort recognizes the full force of the Statute referred to and the conclusions we have drawn as to its undoubted meaning and application.

Morey v. Lochart, 123 U. S. 56, 58.

Wilkenson v. Nebraska et al., 123 U. S. 286-7-8.

Sherman v. Grinnell, 123 U. S. 679-80.

Railway Companies v. Thouron, 134 U. S. 45 to 67.

Gurnee v. Patrick County, 137 U. S. 141-4-5.

Arrowsmith v. Harmoning, 118 U. S. 194.

Church v. Kelsey, 121 U. S. 282 and subsequent cases.

Chanute City v. Trader, 132 U. S. 210.

Richardson v. R. R. Co., 169 U. S. 128.

In re. Penn. Co. Petr., 137 U. S. 451 to 458.

Missouri Pacific v. Fitzgerald, 160 U. S. 556 to 581.

And the reason for this rule of final determination is stated in the last authority cited to be "to contract the jurisdiction of the Federal Courts."

Missouri Pacific v. Fitzgerald, supra.

The conclusions from these authorities as to the present status of the question of jurisdiction, are summed up in the following language:

"If the Circuit Court and the State Court go to judgment respectively, each judgment is opened to revision in the appropriate mode."

The Removal Cases, 100 U. S. 457.

"But if the Circuit Court remands a cause and

the State Court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment. A State Court cannot be held to have decided against a Federal right when it is the Circuit Court, and not the State Court, which has denied its possession. The Supreme Court of Nebraska rightly recognized the courts of the U. S. to be exclusive judges of their own jurisdiction, and declined to review the order of the Circuit Court."

Missouri Pacific v. Fitzgerald, Supra 528.

The above statement of principle and collation of authority is repeated from the brief previously filed on the motion to affirm for the purpose of continuity in the presentation of our views.

In addition to the proposition contended for it may be added that so far as the main point that the order of the Federal Court remanding the cause was effective is concerned, it seems now to be conceded by the learned counsel for plaintiff in error. His brief filed, admits that under the rule in Missouri Pacific v. Fitzgerald the order to remove was effective to transfer the cause back to the trial court of Ramsey County and to give it jurisdiction to finally hear and determine the cause.

Brief for Plaintiff in Error, p. 6.

In leaving this point it might be well to add that the Supreme Court of Minnesota did not seem to have been misled on the subject disposed of by this court, but gave it its adherence in that respect.

Tilley v. Cobb, 56 Minn. 295-299.

Roberts v. Railway, 48 Minn. 521.

Smithson v. Chicago Great Western Co., 71 Minn. 216.

II.

Plaintiff in Error is Barred by its Agreement From Objecting to the Judgment of the State Court.

The stipulation to which reference has been made, providing its terms are sufficient to amount to a waiver by the Receivers, was within their authority, and they undoubtedly could, by their consent, assent to a trial of the cause in the state tribunal.

This principle is so clearly announced by that eminent jurist, Judge Dillon, and his reasons are so cogent that it is not possible to state the rule governing in such cases better than by using his language.

"A party to a suit in a State Court, may, so far as concerns that particular litigation, waive his right to remove the same to the Federal Court. Such waiver touches no question of public policy its effectiveness stands upon the maxim that any man may renounce a legal right which is conferred *only for his own advantage*. And he may make such waiver, after the suit is brought, not only by a stipulation or agreement, but by conduct which is equivalent to a waiver."

Black's Dillon on Removal, page 20, Sec. 15.

Hanover Nat. Bank v. Smith, 13 Blatchf. 224; Fed. Case No. 6035.

Wadleigh v. Standard Ins. Co., 76 Wis. 439; 45 N. W. 109.

Home Ins. Co. v. Curtis, 32 Mich. 402.

Evans v. Smith, 21 Fed. 1.

First Nat. Bank v. Conway, 67 Wis. 210; 30 N. W. 215.

Hudson River Co. v. Day, 54 Fed. 545.

Amy v. Manning, 144 Mass. 153.

Thus the postulate of the Supreme Court of Minnesota (in this case): "That a defendant who is entitled to have a case removed from a state to a Federal Court, or from the latter to the former, there being no question of jurisdiction over the subject matter, or over the parties, may waive his rights to insist upon a removal by his acts or omissions, (Record, page 126) finds the highest support and is indeed obvious, in the very nature of the relations that exists between the State and Federal jurisdiction and the co-ordinate powers of each.

If the proposition be established that the receivers could consent to waive any right to review or consent to the right of the State Court to try the cause so that its judgment would bar their power to question its jurisdiction, the only remaining controversy possible is whether by their stipulation they did so.

The construction of this stipulation has been made the subject of some comment, learned counsel attempts to eliminate from it all essence of consent to jurisdiction of the State Court by what is claimed to be a reading that treats it as if it were merely a provision that if the case was to be tried it should be at a particular term of court, but the agreement goes further, it provides that plaintiff (Smithson) "*shall have a trial* in said court," the time is, of course, not controlled by the Receivers, for it is further provided, so far as the Receivers "Whitcomb and Morris are concerned" and that there might be no mistake as to results, that the pay-

ment of the final judgment by the "Master in Chancery would not be opposed."

It will be remembered that this stipulation was given to relieve a default of several months—had such default not been relieved either by counsel or court, how would it have been possible to contend against the jurisdiction of the State Court to which this cause had been remanded. The law seems to be clear that the removal was *res judicata.*

See authorities cited under part 1.

The palpable effect of which is admitted now by learned counsel on the other side as we have seen, and so far as the practice acts of Minnesota effected this matter, the receivers had no standing, they were out of court, their delay after knowledge of the proceedings was inexcusable, they could not have obtained relief from their default by neglect to answer upon any ground of right. Such relief must, therefore, come from a concession of opposing counsel, and it was agreed upon the expressed consideration that the plaintiff should "have a trial in the State Court," etc., and that no opposition should be made to allowance, etc., of the judgment, there can not be read into this agreement a reservation that as soon as the receivers could answer they should answer the complaint and thereafter dispute the right of the State Court to try the cause."

The disposition of this part of the dispute over the jurisdiction of our State Court, is disposed of by the Minnesota Supreme Court in the following unanswerable manner: "Through this agreement,

they (receivers) secured a substantial right, the right to answer, if prior to that time, there had been *a real controversy* over the receivers' right to have the cause tried in the Federal Court, it was then and there settled by a formal stipulation deliberately entered into by counsel which they must abide by, and which will be enforced by the courts, in the interest of fair dealing and professional good morals."

Opinion of Justice Collins, Transcript of Record, page 126.

III.

THAT THE PETITION AND BOND FILED AT THE CLOSE OF THE TRIAL DID NOT DEPRIVE THE STATE COURT OF THE RIGHT TO GO ON TO FINAL JUDGMENT.

If the second petition and bond filed at the close of the evidence were efficient to remove the cause at the time they were filed, it must be conceeded that up to the moment they were filed the State Court then engaged in the trial of the cause, had plenary jurisdiction not only over the subject matter but over the parties as well, and if the contention of counsel, that the petition then filed deprived the court of jurisdiction at that time be well taken the act of Congress which gives to the remanding order its ultimate and conclusive force, only means that the order shall be "immediately carried into execution," to be continued in effect only so long as the State Court retains control of all the parties.

If the State Court were to have jurisdiction only so long as it should continue control of all the parties its jurisdiction would be emasculated of that virile essential element of all judicial power *freedom of action,* without which the right to *hear and determine* a cause would be a farce, and "due process of law" in a State Court would be handicapped by uncertain conditions impossible to carry out in the ordinary course of justice between the state and federal jurisdictions, for instance the ruling in this case was by the Court, it might be right, and it might not be, the ruling of the State trial court upon this matter was reviewable. It was an instruction upon which either the co-defendant or Receivers could appeal and appeal to the Supreme Court of that state.

If this order, during the trial which might be reviewed, would immediately authorize a removal and this without restriction as to any formal rule regarding the time within which the petition should be interposed, then of course the whole case must be transferred with all defendants to the Federal Court who could and might again remand to the State Court. In the meantime what would be done with so much of the case as had been tried and so much as had not been heard. Would the part rightly in the state court have to be again heard with other contingencies easily supposed but impossible of execution in the orderly course of justice, and during all this time what would be done with the jury rightly called to determine the case in the State Court at a time when such court concededly had the

right to try and determine it or supposing that the court of review in Minnesota should say upon an appeal, which would be necessary to make the order of the trial court final, that the instruction taking the case from the jury as to the Great Western Company was wrong, and that the trial court must submit the right to recover against both companies to the jury, retaining the relation of both parties to the case, what then? No one can tell.

This last supposition is clearly not improbable upon the record in this case.

The trial Court was of the opinion that the rules adopted by the Terminal Company were sufficient, we think upon the evidence that the duty of the master in a complicated and dangerous business to establish rules for his servants and that whether the master has done so in a given case is a question for the jury is too well settled upon reason and authority to admit of doubt.

Abel v. Priests, etc. of Deleware, etc. Canal Co., 103 N. Y. 581.

Sheehan v. New York, etc., R. Co., 91 N. Y. 332.

Lake Shore etc. R. Co. v. Lavalley, 36 Ohio St. 221.

Vose v. Lancashire R. Co., 2 Hurl. & N. 728.

Regan v. St. Louis etc. R. Co., 93 Mo. 348.

Luebke v. Chicago etc. R. Co., 59 Wis. 127.

Missouri Pac. R. Co. v. Watts, 63 Tex. 549.

Gulf etc. R. Co. v. Ryan, 69 Tex. 665.

Gardner v. Michigan etc. R. Co., 58 Mich. 584.

Wolsey v. Lake Shore etc. R. Co., 33 Ohio St. 227.

Hayes v. Bush, etc. Mfg. Co., 41 Hun. (N. Y.) 407.
Pilkinton v. Gulf etc. R. Co., 70 Tex. 226.
Alexander v. Louisville etc. R. Co., 83 Ky. 590.
Baltimore etc. R. Co. v. Kean, 65 Md. 394.
Pringle v. Chicago etc. R. Co., 64 Iowa 613.
Central Railroad v. Mitchell, 63 Ga. 173.
Ford v. Fitchburgh etc. R. Co., 110 Mass. 240.
Thomas v. Memphis R. Co., 51 Miss. 637.
Covey v. Hannibal etc. R. Co., 27 Mo. App. 170.

While the merits of this controversy are not perhaps reviewable on this hearing, yet it is to be noted that in a difficult situation where the utmost precaution relating to the movements of engines was required, Smithson's employer made no rules whatever but adopted those of the terminal company and the Terminal Company provided certain rules for the giving of signals but did not require each engine in the yard to have sufficient lights upon the tender as warning to the engine that might be following the engine running ahead, and if the receivers as well as the Great Western Company were to adopt the rules of the Terminal Company so that the rules adopted would become their own, it would seem to have been the right of Smithson to rely upon some such rule. As this is an indication to show a provision that might have avoided the accident and was within the consideration of the jury, more in the record might be suggested for such consideration in view of the necessity of active progress in hazardous and difficult situations such

as were likely to rise in the business between the Terminal Company and its lessees.

To conclude, it is urged that the case of Powers v. Chesapeake & Ohio Ry. Co., 196 U. S. 92, is an authority in favor of the right of the receivers to have had the cause removed during the pendency of the trial. We do not assent to this.

The facts in the Powers case as disclosed by the opinion of the court show that before the beginning of the trial the plaintiff had dismissed as to one of the defendants, thus removing the element of *non consent* upon which the case had been remanded, and practically commenced a new action so far as the jurisdictional element was concerned, and opposing no objection to the removal at that time except the question of time which the court held in Ayers v. Watson, 113 U. S. 594 was but *"modal* and *formal"* and the same question of time was "when necessary to carry out the purpose of the statute, must yield to the principal enactment as to the rights."

It would seem hardly worth discussion to claim that when a court without the consent of the interested party had entered upon the actual trial of the case that the existence of its jurisdiction was more than merely a *"modal or formal"* element, that it was vital and that the trial of a case in a State Court having jurisdiction, is not subject to interruptions calculated to destroy the effect of any trial in the exercise of its undoubted prerogatives to decide between both of the parties or per-

chance against either. In such a case, it would seem to follow in the language of a learned Federal Judge "That ultimately it may turn out that one (of the parties) is not liable at all and the other exclusively so, *is a question on the merits and does not effect the jurisdiction.*"

Arrowsmith v. Nashville Railroad Co., 57 Fed. 169.

It is respectfully submitted that the judgment of the Supreme Court of the State of Minnesota should be affirmed.

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